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THE ENVIRONMENTAL ASSESSMENT
PROGRAM

CONSERVATION & PROTECTION
WESTERN & NORTHERN REGION

THE LAW: LEGAL RESPONSIBILITIES AND LIABILITIES

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THE LAW: LEGAL RESPONSIBILITIES AND LIABILITIES

INTRODUCTION

The purpose of this Paper is to identify and discuss the source and nature of legal duties of relevance to the Environmental Assessment Program ("the Program"). In particular, the following legislation will be reviewed: (1) the **Department of the Environment Act**,[1] (2) the **Environmental Assessment and Review Process Guidelines Order** [2] and (3) the proposed **Canadian Environmental Assessment Act**.[3]

There are three parts to this paper. In the first part some basic legal concepts are presented as background information. This includes a discussion of the difference between law and policy, the effect of judicial interpretation of legislation and the consequences of failing to meet the requirements of law.

The legislative history, purpose and content of the **Department of the Environment Act** ("DOE Act") is given in the second part. This Act is particularly relevant to the Program as it is the primary (legislative) source of information about the roles and responsibilities of the Minister of the Environment and, by implication, Environment Canada.

A comprehensive review of the **Environmental Assessment and Review Process Guidelines Order** ("EARP Guidelines Order") follows in part three. The emphasis in this part will be on **what** needs to be done, and **by whom** in order to meet the requirements of the environmental impact assessment process.

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[1] R.S.C. 1989, c.E-10.

[2] SOR 84/467.

[3] This is (currently) Bill C-78. The Bill as presently drafted has received second reading by Parliament. However, there are apparently numerous and significant amendments now under consideration by Cabinet. It is likely that the Bill will be reintroduced at the next session of Parliament, either in its present form or as a new Bill, with or without the amendments. Personal communication with FEARO, May 7, 1991.

The last part provides a description of the **Canadian Environmental Assessment Act** ("CEAA") with particular attention paid to the differences between the proposed legislation and the EARP Guidelines Order.

Please note: The information and commentary provided in this Paper is not intended to be, nor should it be considered as, legal advice.

1. THE NATURE AND EFFECT OF LAW

Three issues will be discussed in this Part: the difference between law and policy; sources of law and the relationship between them, and the consequences of failing to comply with the law.

1.1 Law and Policy

Distinguishing law from policy is not always easy and, in some cases, is not particularly meaningful. There are circumstances, however, in which this distinction is of tremendous significance. Good examples of this are recent events concerning the EARP Guidelines Order.

Until the 1989 decision of Mr. Justice Cullen of the Federal Court Trial Division in the case of **Canadian Wildlife Federation Inc. et al.. v. Minister of the Environment et al..,** [4] the EARP Guidelines Order was widely believed to be nothing more, or less, than an expression of federal government policy. Although members and servants of the federal government were required to comply with its terms, their compliance was not compellable by the courts. This understanding of the EARP Guidelines Order was displaced by Mr. Justice Cullen who found that:[5]

> ...I agree that the EARP Guidelines Order is an enactment or Regulation as defined in S. 2 of the **Interpretation Act**... Therefore, the EARP Guidelines Order is not a mere description of a policy or programme; it may create rights which may be enforceable

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[4](1989) 3 C.E.L.R. (N.S.) 287.

[5]**Reasons For Order**, April 10, 1989, at 11.

by way of **mandamus** [6]...

This interpretation of the EARP Guidelines Order was upheld by the Federal Court of Appeal who went on to find that it was a "law of general application".[7] The issue of whether the EARP Guidelines Order is law or policy was recently argued before the Supreme Court of Canada in the case of **Her Majesty the Queen in Right of Alberta et al.. v. The Friends of the Oldman River Society et al...** [8] Unless and until the Supreme Court overturns the interpretation of the Federal Court of Appeal, the EARP Guidelines Order is a law of general application in Canada.[9]

The significance of this judicial interpretation is readily apparent from the proliferation of legal action taken since the 1989 decisions.[10] Such action has been concerned with major projects like the Oldman Dam in Southern Alberta, issues of national security like low level test flights over the Eastern Arctic, and a host of matters in between.[11]

For present purposes, then, the most significant distinction between law and policy is that the requirements of law can be enforced through the justice system.

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[6]Mandamus is a prerogative remedy, which means that it is issued at the pleasure of the courts of superior jurisdiction. An order of mandamus requires that those having mandatory public responsibilities or duties fulfil them in the manner intended by law.

[7]Saskatchewan Water Corporation v. Canadian Wildlife Federation, Reasons For Judgement Of The Court, June 22, 1989 at 2.

[8]The case was heard February 19 - 20 , 1991. As of May 8, 1991 no decision had been rendered.

[9]The mere fact that a case has been appealed to a higher court does not "undo" the effect of the lower court's decision, unless that decision has been stayed.

[10]See Appendix I for a list of cases , and their effect upon the application and interpretation of the EARP Guidelines Order.

[11]Respectively, **Friends of the Oldman River Society v. Minister of Transport and Minister of Fisheries and Oceans**, (March 13, 1990), Ottawa A-395-89 (F.C.A.D.) and **Naskapi - Montagnais Innu Association v. Minister of National Defence, Minister of the Environment** (April 12, 1990) Ottawa T-450-90 (F.C.T.D.).

A failure to comply with policy, on the other hand, may result in (administrative) disciplinary action or political embarrassment. Such consequences, however, are not the products of legal action or judicial decision making.

Because compliance with the law can become an issue in litigation, it is important that a record of compliance be maintained. The record should satisfy those, like justices of our courts, who may not be familiar with the day-to-day operations of a department, that the requirements of the law were met by the right people, in the right way at the right time. Meeting departmental needs for documentation may not result in a record sufficient to withstand cross-examination.

1.2 Sources of Law

There are two sources (and kinds) of law in Canada: common law and legislation.[12]

The common law consists of legal rules and principles developed over centuries by the courts of England and Canada. It is a dynamic body of law which is constantly evolving as successive jurists consider and decide cases before them. For that reason, common law is also referred to as "case law" or the law which can be found in the reasons for judgement given with respect to individual cases.

Legislation is the result of a formal enactment process undertaken by our elected representatives and the representative of Her Majesty the Queen. The primary form of legislation is the statute. As Acts of Parliament or of the legislatures, statutes are the result of a formal legislative process. Subordinate legislation, including regulations, must be authorized by and consistent with the terms of the statute under which it is enacted. Typically, statutes contain basic principles, rights, obligations, powers and prohibitions, leaving the details to regulation. The authority to enact regulations is usually delegated to various arms of the government; the Governor General in Council or a minister, for example.

As noted above, the EARP Guidelines Order was found by the courts to be a regulation

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[12]In Quebec, civil law replaces the common law.

enacted by the Minister of the Environment pursuant to the DOE Act.[13]

Legislation takes precedence over the common law. That is, where legislation conflicts with the common law, the former prevails.[14] More often than not, however, common law interprets or "fleshes out" the meaning of legislation which tends to be written in very broad and general terms. In that case the common law augments or adds to legislation, which must then be understood and applied in a manner consistent with judicial interpretation.

Judicial interpretation is guided by principles or cannons of construction. Generally, in the absence of statutory definition, the courts will give words their ordinary and common meaning, providing that it is consistent with the overall scheme and intent of the legislation.[15]

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[13]This issue will be discussed in greater detail in Part 3.

[14]David Phillip Jones and Anne S. deVillars, Principles of Administrative Law (Toronto:Carswell, 1985) at 62-63.

[15]In determining the "intent" of legislation, the courts confine their inquiry to the actual text or "four corners" of the legislation itself. In litigation concerning the constitutionality of legislation, however, the courts may go further and take into account extrinsic evidence like Parliamentary debates, and so on.

2. DEPARTMENT OF THE ENVIRONMENT ACT

2.1 Legislative History and Purpose

The DOE Act did not exist as a separate statute until 1988 when the 1985 Revised Statutes of Canada were proclaimed in force.[16] From 1970 until 1988 the Act was part of the **Government Organization Act**;[17] it was at that time (1970) that the Department of the Environment was created.[18]

In general terms the DOE Act establishes a Department of the Environment which is to be "presided over" by the Minister of the Environment who "holds office during pleasure and has the management and control of the Department".[19] The Act recognizes the right of Cabinet to appoint a Deputy Minister of the Environment, who also holds office "during pleasure".[20]

Of particular relevance to the Environmental Assessment Program are sections 4, 5, and 6. Section 4 sets out the "powers, duties and functions" of the Minister which include:

1. the preservation and enhancement of the quality of the natural environment, including water, air and soil quality,

2. renewable resources, including migratory birds and other non-domestic flora and fauna,

3. water,

4. the coordination of the policies and programs of the Government of Canada

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[16]This Revision was proclaimed in force on December 12, 1988 and represented the state of the law on December 31, 1984.

[17]R.S.C. 1970, c.14 (2nd Supplement).

[18]From 1970 to 1978-79, the Department of the Environment was also the Department of Fisheries and Oceans.

[19]Section 2.

[20]Section 3.

4. the coordination of the policies and programs of the Government of Canada respecting the preservation and enhancement of the quality of the natural environment, and

5. national parks.

Section 5 provides details on how the Minister is to exercise his power and fulfil his responsibilities.[21] To fulfill the mandate established in section 4, the Minister of the Environment must:

1. initiate, recommend and undertake programs and coordinate Government of Canada programs designed to:

- promote the adoption of environmental protection standards, including pollution control measures,

- ensure that new federal projects, programs and activities are assessed for potential adverse effects on environmental quality,

- ensure that a further review is conducted if such effects are found,

- ensure that the results of that review are taken into account, and

- provide Canadians with environmental information, in the public interest,

2. promote and encourage better practices and conduct, leading to improved preservation and enhancement of the natural environment,

3. co-operate or participate in other programs having a similar purpose, and

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[21]It is important to note the use of the word "shall" in section 5. According to the federal Interpretation Act, R.S.C. 1980, c. I-21, "shall" is generally to be considered imperative, and gives rise to a mandatory duty or obligation.

all matters relating to the preservation and enhancement of the quality of the natural environment.

Section 6 is of greatest significance to the environmental impact assessment process as it has been recognized as the statutory authority for the EARP Guidelines Order.[22] That section authorizes the Minister of the Environment to enact guidelines for use by federal departments, boards and agencies.

In general terms then, having regard to the content of the DOE Act, the effect and purpose of the Act is to create a department, under the direction of a Minister and a Deputy Minister, both of whom hold office at the pleasure of the Governor General in Council; to describe the "powers, duties and functions" of the Minister and to require that certain activities be done by the Minister in the exercise of his power and in the fulfilment of his duties.

2.2 Legal Implications

An interesting question of law, as yet not considered by the courts, is this: do sections 4 and 5 of the DOE Act give rise to mandatory duties which are enforceable against the Minister of the Environment through legal action?

The issue arises, primarily, because of the use of the word "shall" in section 5, coupled with the word "duties" in section 4. According to the federal **Interpretation Act**[23], "shall" is (generally) to be considered imperative. This should mean that the activities listed in section 5 are mandatory on the part of the Minister of the Environment. However, it is not entirely clear that any of those activities are related to a **duty** (and are therefore compellable) or to a **power**. For example, does the Minister have a **duty** to undertake a program for the purpose of promoting the adopting of environmental quality standards (s.5) as part of his mandate over protection of the natural environment (s.4) or does he, instead, have the **power**, should he so choose?

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[22]See **Canadian Wildlife Federation Inc. et al. v. Minister of the Environment et al** (1989) 4 C.E.L.R. (N.S.) 1 (F.C.A.D.); (1989) 3 C.E.L.R. (N.S.) 287 (F.C.T.D.).

[23]R.S.C. 1980, c.I-21.

At present this question is of academic interest only; however, given recent events, it might be useful to consider the DOE Act as a potential basis for litigation.

Above and beyond this issue, the Act is of obvious relevance to the Environmental Assessment Program.

It is easy to see that environmental impact assessment directly relates to the Minister's mandatory duty to ensure the assessment of new federal projects, programs and activities. In the same way, it is easy to understand the environmental impact assessment process as, at the very least, a "program" designed to achieve that result.

The relationship between environmental impact assessment and the mandatory duty to "promote", "encourage", "recommend" and "advise" is less obvious. There appears to be a need for a program of environmental impact assessment even if it does not, necessarily, fulfill an advocacy or advisory function. In the same way, there is a separate duty to advocate and advise. Environmental impact assessment, then does not begin and end with the provision of advice nor does the provision of advice have to occur within the context of environmental impact assessment. The duty to promote better environmental protection standards or to advocate the institution of better practices and conduct is not contingent upon the environmental impact assessment of a particular project.

In short, environmental impact assessment, advocacy, the provision of advice and regulatory action should be viewed as separate activities which take place in the context of programs undertaken, initiated or coordinated by the Minister of the Environment, or his Department on his behalf.

That said, there is an obvious relationship between environmental assessment, as a program, and the Minister's duties to advise and advocate. For example:

- information gained through environmental impact assessment might be used to develop a policy position which could be expressed through advocacy activities designed to encourage better practices. The same information might influence federal regulatory decision making, or may enhance the ability of Environment Canada to provide "expert advice";

- the application of the environmental impact assessment process itself may result in a legal obligation to provide advice or to make information available to the public;
- environmental assessment might be undertaken, even though not required by law, to assist in the formulation of departmental policy or to enhance the quality of advice;
- monitoring done pursuant to regulatory requirements or as a part of a mandatory environmental impact assessment process (implementation and follow up) may result in information which would facilitate the provision of advice and enhance the accuracy of future environmental assessments.

2.3 The Minister and The Department

Are legislative duties and responsibilities given to the Minister of the Environment automatically the duties and responsibilities of his Department? In theory, no. Unless specifically assigned to a civil servant, like the Deputy Minister, for example, legislative duties given to the Minister remain with him. Should he fail to meet these mandatory obligations, legal action can be taken against the Minister to force compliance.[24]

That said, however, it should be recalled that departments obtain their authority and instructions from their Ministers and, to varying degrees, are the vehicles through which Ministerial responsibilities are delivered.[25]

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[24]The style of cause of actions against government members is prescribed by law, and generally is framed as X v. Her Majesty the Queen as represented by the Minister of Y, (where the cause of action relates to Ministerial or departmental matters).

[25]J.A. Griffith and Michael Ryle, Parliament: Functions, Practice and Procedures (Sweet & Maxwell: London, 1989) at 27-28. See also Paul Lordon, Crown Law, (Butterworths:Toronto and Vancouver, 1991). At page 40, Mr. Lordon comments as follows:

"An exception to the delegatus principle which operates in favour of Ministers or government Departments finds its origin in Carltona v. Commissioner of Works [1943] 2 All E.R. 560 (C.A.). The thrust of the Carltona doctrine is that, generally speaking, legal powers conferred on a Minister are not expected to be performed by him or her but rather by 'responsible officials of the department' acting for and on his or her behalf. ...".

The DOE Act does not specifically assign any duty, power or function on anyone other than the Minister of the Environment. Though the day-to-day exercise of power and fulfillment of duties and functions has been (demonstrably) delegated to Environment Canada, the Minister alone is accountable and liable before the law.[26]

3. THE EARP GUIDELINES ORDER

3.1 Legislative Purpose and History

The legislative purpose and history of the EARP Guidelines Order was neatly summarized by P.S. Elder in a 1985 article[27]. He wrote:

> In 1973, the Government of Canada by cabinet directive established the federal Environmental Assessment and Review Process (EARP) to ensure that the environmental effects of federal proposals were assessed before binding commitments were made. Authority for the process was entirely administrative until the **Government Organization Act, 1979** mandated the Minister of the Environment to undertake and coordinate governmental impact assessments for "new federal projects, programs and activities". If these proposals are found to have probable significant adverse effects, the results of the review are to be "taken into account", presumably at the approval or implementation stage.
>
> The legislation also authorized the same minister, with Cabinet approval, to establish "guidelines' for the use of various federal departments and agencies... In June, 1984, following a Department of the Environment Discussion Paper, the **Environmental Assessment and Review Process Guidelines Order**...was issued. ...

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[26]This comment is made with respect to civil liability for failure to comply with mandatory statutory duties and should not be considered outside of that particular context.

[27]P.S. Elder, "The Federal Environmental Assessment and Review Process Guidelines Order, Resources, Vol. 13 (Canadian Institute of Resources Law, University of Calgary: Calgary, 1985).

Until the 1989 decision of the Federal Court, Trial Division in the CWF case [28], the EARP Guidelines Order was considered to be a formal expression of government policy which had been in effect for a number of years before 1984. The Order, it is said, was intended to "clarify roles, responsibilities and procedures in the assessment of projects".[29]

Whatever the intent of the Minister of the Environment (and Cabinet) in enacting the EARP Guidelines Order, it has since been found by the courts to have the force of law and gives rise to public rights which can be enforced through legal action.[30] Such a determination has not had the effect of "converting" the Order into law; such a feat is constitutionally impossible. Instead, the effect of judicial interpretation has been to change the understanding of the EARP Guidelines Order by those responsible for its administration and to make the public aware that non-compliance with its terms can be addressed through legal action..

Whether policy or law, it is quite clear that the intent behind the creation of an environmental impact assessment process was to change the manner in which federal departments (etc.) make decisions about projects over which they have (some) control. Specifically, federal decision makers are required to take into account the likely impact of proposals on the environment. In simple terms, then, the environmental impact assessment process was intended to change the way in which decisions are made and, where appropriate, to provide solutions for undesirable environmental effects.

3.2 The EARP Guidelines Order: An Overview

(a) Application

Much has been written, and said, about the environmental impact assessment process established by the EARP Guidelines Order ("the Process"). The intent of this section and the sections which follow is not to provide a comprehensive legal analysis of the nature of the

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[28]Supra, n. 5.

[29]Madeleine Donahue, "What Environmental Assessment At The Federal Level Really Means", Environmental Regulation At Federal Facilities And Lands (Government of Canada: Ottawa, February 25-26, 1991) at 5.

[30]Supra, n. 5 (F.C.T.D.).

Process as interpreted and enforced by the courts. The focus, instead, will be upon the general scheme of the Process and its relevance to the work of Regional staff.

Although the Process was apparently intended to change decision making of federal officials, its application is expressed in terms of "proposals".[31] As defined in s.2, a "proposal" includes:

> ...any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.

In his decision regarding the application of the Process to the Oldman River dam in Alberta, Mr. Justice Stone, speaking for the Federal Court of Appeal, found that:[32]

> ...Although the word "proposal" in its ordinary sense may mean something in the nature of an application, in the Guidelines Order it is a defined word which is used to encompass a scope far broader than its ordinary sense. ...
>
> Plainly, nothing in the nature of an application is required by the words employed in this definition. As I see it, applications or requests for authorizations or approvals are but a means of calling a Minister's attention to the existence of an "initiative, undertaking or activity" but they are not the only means. A Minister may become aware... in some other way, which I think would include a request of an individual for specific action falling within the Minister's responsibilities under a statute which he is charged with administering on behalf of the Government of Canada. In such circumstances, if any "initiative, undertaking or activity" exists for which the Government of Canada has a "decision making responsibility" a "proposal" also exists.

As discussed previously, the effect of judicial interpretation is to clarify the meaning and nature of legislation. In this instance, the effect of this decision was two-fold: one, that

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[31]Supra, n. 3, s.6.

[32]Supra, n. 12 at 23. This decision is under appeal to the Supreme Court of Canada.

as used in the EARP Guidelines Order, the meaning of "proposal" is much broader than its common and ordinary meaning and two, that a "proposal" does not mean an "application". That is only one way in which "proposals" can be brought to the attention of a Minister[33].

In order for there to be a "proposal", however, there must be federal "decision making responsibility". The meaning of that phrase has been troublesome. If the existence of a "proposal" is not contingent upon an application for an approval, it should follow that "decision making responsibility" goes beyond regulatory authority. That clearly was the implication of the decision of the Federal Court of Appeal in the **Oldman** case.[34] There, Mr. Justice Stone, speaking for the Court, found:

> Plainly, the protection of the fish habitat and fisheries fall within the responsibilities of the Minister [of Fisheries and Oceans] and his department under the **Fisheries Act**. The letter [from a citizen]...required of the Minister fulfilment of his responsibilities to protect such fish habitat ...and rendered him the "decision making authority" for determining what action would be taken... It was open to the Minister to decide either not to intervene or to make a 'request' of the dam proponent and proceed under section 37, and decided he did. In so doing, the Minister fell under the obligations of an "initiating department...

The exact nature of "decision making" sufficient to constitute a "proposal" remains uncertain and the failure of the courts to restrict that meaning to regulatory authority has been soundly criticised, particularly by other governments and proponents of projects. In view of that uncertainty two options are open for federal officials: err on the side of caution and assume that any project coming within federal jurisdiction is a "proposal" or err on the side of expediency and, if in doubt, assume a project is not subject to the Process. The first option is, for many departments, simply too ambitious and not possible given existing resources. The second increases the likelihood of legal action to compel compliance with the Process.

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[33]In the circumstances of the case before them, the Federal Court of Appeal found that a request from a citizen that the Minister of Fisheries and Oceans exercise his authority under s. 37 of the **Fisheries Act** and require information, was sufficient notice of a "proposal" for which that Minister had "decision making responsibility".

[34]**Supra**, n. 12 at 23.

Not all "proposals" are subject to the Process; only those:[35]

1. undertaken directly by an "initiating department",

2. which may have an environmental effect on an area of federal responsibility[36],

3. to which the Government of Canada makes a financial contribution, or

4. located on lands administered by the Government of Canada. An "initiating department" is also a defined term and means "any department...which is the decision making authority for a proposal".[37]

If any of these conditions exist, the Process applies and the proposal must be reviewed. There are two exceptions to this general rule:

1. The Process does not apply to certain Crown Corporations unless it is within their legislative authority and their policy is to apply the Process.[38]

2. The Process only applies to federal boards or agencies having a regulatory function with respect to a proposal if it would not result in duplication or legal impediment to that function.[39]

(b) The Process - An Overview

Section 3 provides some general information about the intent, nature and timing

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[35]Section 6.

[36]This appears to mean "within the constitutional authority of" the federal government.

[37]Section 2. The unfortunate use of the words "decision making authority" raises, again, the problem of uncertainty.

[38]Section 7.

[39]Section 8.

of the Process. It provides:[40]

> 3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

The Process has four separate stages: environmental screening/initial assessment, post-initial assessment, panel review, post-panel review. Each of these will be discussed below.

Environmental Screening/Initial Assessment. Although the EARP Guidelines Order refers to "environmental screening or initial assessment", the terms appear to be synonymous and relate to the first stage of the Process. To avoid confusion the term "initial assessment" will be used here to refer to that stage.

Initial assessment requires a department[41] having "decision making responsibility" to:

> 1. Subject the proposal to an initial assessment to determine whether there may be any potentially adverse environmental effects. The degree of study required will obviously vary from proposal to proposal; however the use of "exclusion" and "panel review" lists is intended to expedite matters. According to section 11, the initiating department shall develop, in cooperation with the Federal Environmental Assessment Review Office ("FEARO") two lists: one identifying the types of proposals which do not result in any adverse environmental effects and which can be "automatically excluded"

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[40]There is significant similarity between the wording of this section and section 6 of the DOE Act.

[41]Where there are two or more departments having decision making responsibilities with respect to a proposal, they are to determine between themselves how the duties of an "initiating department" are to be divided. In the event of a dispute, FEARO is to act as an arbitrator; s. 9.

from the remaining stages of the Process,[42] and the other identifying types of proposals likely to result in significant adverse environmental effects and which will therefore be automatically referred to the Minister for public review by a panel.

2. If a proposal is not on either list, a decision must be made on a case-by-case basis. The possible decisions are given in section 12:

(a) the proposal can proceed with or without mitigation if the potential adverse environmental effects that may be caused are insignificant or mitigable with known technology,[43]

(b) the proposal must be subjected to further study or referred for public review by a panel if the potentially adverse environmental effects are unknown,

(c) the proposal must be referred for public review by a panel if the potentially adverse environmental effects are significant,[44] or

(d) the proposal must be either abandoned or modified and reassessed if the potentially adverse environmental effects are unacceptable.

In any event, even if a proposal is of type on an initiating department's exclusion list, a proposal can be referred to the Minister of the Environment if "public concern about the

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[42]As the identity of the "initiating department" is contingent upon the nature of any one proposal, it would be impossible to develop any exclusion list containing anything other than that particular proposal. Presumably what is intended is that every federal department should develop a list of the types of proposals, for which they would likely have decision making authority, which could be automatically excluded from further study.

[43]As a result of the decision by Mr. Justice Muldoon of the Federal Court Trial Division in Canadian Wildlife Federation Inc. et al. v. Minister of the Environment et. al., (1989) 4 C.E.L.R. (N.S.) 201 (F.C.T.D.), mitigation measures justifying a decision under s.12(c) must be achievable through known technology and the effect of mitigation must be to render adverse environmental effects insignificant.

[44]The "significance" of effects is to be determined in accordance with criteria developed by "the" initiating department and FEARO.

proposal is such that a public review is desirable".[45] Another "caveat" is given in section 14 which provides:

> Where, in any case, the initiating department determines that mitigation or compensation measures could prevent any of the potentially adverse environmental effects of a proposal from becoming significant, the initiating department shall ensure that such measures are implemented.[46]

Once the initiating department has made a decision pursuant to section 12, but before the implementation of any mitigation or compensation measures as required by section 14, it must ensure that the public has access to information on and a chance to respond to the proposal.[47]

With respect to the responsibilities of the initiating department at this first stage of the Process, one writer has commented :

> The initiating department is responsible for proceeding with the studies and technical data required to properly classify the proposal and must ensure that the public has access to its initial assessment decision on request. The FEARO office [sic] can assist departments with initial assessments.[48]

Post-Initial Assessment. There are a number of events which must take place before a panel can proceed with a review of a proposal. These are:

1. The members of the panel must be appointed by the Minister of the Environment and must meet the requirements set out in section 22.[49]

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[45]Section 13.

[46]As the courts have only recognized two types of effects under the EARP Guidelines Order, significant and insignificant, presumably this means that mitigation must be considered and recommended with respect to the latter.

[47]Section 15.

[48]Supra, n. 29.

[49]Sections 21, 22.

2. The Chairman of the panel must be appointed by the Minister and the Executive Secretary must be appointed by the Chairman.[50]

3. In consultation with the Minister of the initiating department, the Minister of the Environment must issue terms of reference for the review.[51]

4. The panel, once appointed, must conduct a public information program to advise the public of its review and must prepare its own detailed operating procedures. [52]

Review by a Panel. During this stage, the proposal is reviewed according to the panel's terms of reference in public hearings which are to be conducted in "a non-judicial and informal but structured manner".[53] This apparently means that the hearings are to be organized and orderly without adopting all the trappings and procedures of the court room. At the conclusion of the hearings, the panel is required to prepare a report containing its conclusions and recommendations and give it to both the Minister of the initiating department and to the Minister of the Environment.

Decision Making and Implementation. Both Ministers are required to (ultimately) make the report submitted by the panel available to the public. Although not specifically authorized or required to do so, it also appears that decisions are to be made by "the appropriate Ministers". This statement is based upon section 33(1) which requires the initiating department to:

1. decide, in cooperation with any other department (etc.) to whom the recommendations of a panel are directed, the extent to which the recommendations should become a federal government requirement, before a proposal is allowed to proceed,

2. ensure, in cooperation with others, that "any decisions made by the appropriate

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[50]Section 23.

[51]These are to be drafted by FEARO, in consultation with the initiating department, and must be made available to the public (s.26).

[52]Sections 27(2), 28.

[53]Section 27.

Ministers" as a result of the panel's conclusions and recommendations, are "incorporated into the design, construction and operation of that proposal and that suitable implementation, inspection and environmental monitoring programs are established"[54], and,

3. determine the manner in which the decisions are to be made public.

It is the responsibility of the proponent to:[55] "ensure that appropriate post-assessment monitoring, surveillance and reporting, as required by the initiating department , are carried out".

At this stage the Process comes to an end, except for the ongoing monitoring (etc.) by the proponent. It is interesting to note that although the Process is intended to have an effect upon federal decision making about a project, nothing in the EARP Guidelines Order requires a proponent to wait until the Process has run its course before proceeding with a proposal. This is the effect of the decision of the Federal Court Trial Division in **Naskapi-Montagnais Innu Association v. Minister of National Defence.**[56]

3.3 The Process And The Players

A detailed description of the roles, responsibilities and powers of the various "players" in the environmental impact assessment process is provided in this section.[57] The information provided here is set out in summary form in Appendix II.

(a) The Proponent

As defined in section 2 of the EARP Guidelines Order, a "proponent" is an organization or initiating department intending to undertake a proposal. It should be clearly understood

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[54]Section 33(1)(d).

[55]Section 34(f).

[56]Supra, n.12.

[57]This description is based upon the contents of the EARP Guidelines Order as interpreted by the courts.

that the roles and responsibilities of a proponent are distinct from the roles and responsibilities of an initiating department. This is so even though a federal department undertaking a proposal is, by definition, both a proponent and (at least) one of the initiating departments.

The primary distinction between the two roles is that a proponent is not required to do an initial assessment of a proposal or to make decisions about its environmental impacts. That is the responsibility of the initiating department.

Instead, the responsibilities of a proponent really begin in the stage leading up to a public review by a panel. These responsibilities include:[58]

1. The preparation of an Environmental Impact Statement, if required, in accordance with any terms of reference which may be issued by the panel. The proponent must also provide supporting documentation. Both the Statement and the supporting documentation must be provided in such languages and numbers as required to meet the purpose of the public review. (34(a)(b))

2. The implementation of a public information program to explain the proposal and its potential environmental effects.(34(c))

3. The provision of additional information, if required, to meet any deficiencies noted by the panel. (34(d))

4. The presence of senior officials and expert staff at panel hearings to make presentations and respond to questions. (34(e))

After the panel review stage is finished, the proponent has only one ongoing responsibility: to ensure that appropriate post-monitoring surveillance and reporting, as may be required by the initiating department, are carried out. This responsibility raises an interesting question about the ability of a federal initiating department to compel compliance by a proponent.

Sections 14 and 33(1)(d) of the EARP Guidelines Order gives to the initiating

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[58]Numbers in ( ) refer to sections of the EARP Guidelines Order.

department the duty to, respectively:

1. ensure that any mitigation or compensation measures identified by them as being capable of rendering all potentially adverse environmental effects insignificant are implemented, and

2. in cooperation with others concerned with the proposal, ensure that any decisions made by "appropriate Ministers", as a result of the recommendations of a panel, are "incorporated into the design, construction and operation of that proposal and that suitable implementation, inspection and environmental monitoring programs are established;".

In the absence of any regulatory or (other) enforcement authority, just how is an initiating department supposed to fulfill these duties if a proponent refuses to cooperate? Particularly, as has been the case recently, if the proponent is either a provincial government or a private developer subject to provincial environmental regulation? It should not be assumed that a lack of voluntary cooperation with the requirements of the Process can be "cured" through legal action. The courts have shown a marked reluctance to compel performance in the absence of clear legislative authority.[59]

(b) The Initiating Department

The role of the initiating department is an important one and its responsibilities extend to all stages of the Process. There may be more than one initiating department with respect to any particular proposal; that is because more than one department may have "decision making authority" with respect thereto. For example, a proposal which may require a permit under a federal statute, like the **Navigable Waters Protection Act**, may also be one for which the Department of Fisheries and Oceans has decision making authority pursuant to the **Fisheries Act**.

In the event that there are two or more initiating departments, section 9 of the EARP Guidelines Order provides:

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[59]See, for example, **Naskapi-Montagnais Innu Association v. Minister of National Defence**, supra, n. 12.

9. (1) Where, in respect of a proposal, there are two or more initiating departments, the initiating departments shall determine which of the responsibilities, duties and functions of an initiating department under these Guidelines apply to each of them.

(2) Where the initiating departments cannot... agree to a determination, the Office [FEARO] shall act as an arbitrator in the making of the determination.

In other words, the departments having decision making authority for a proposal divide the work of an initiating department between them, with all fights settled by FEARO.

Whether there is one initiating department or many, they have the responsibility to ensure that the environmental implications of proposals are fully considered "as early in the planning process as possible and before irrevocable decisions are taken".[60] The late application of the Process, in some instances, has been noted by the courts with more than a little cynicism. In the case of **Canadian Wildlife Federation Inc. et al.. v, Minister of the Environment et al..**[61], it was argued on behalf of the Minister of the Environment that, in the event that the Court found that the Minister did not comply with the Process, the Court should exercise its discretion to excuse the non-compliance in recognition of such efforts as had been taken to review the environmental effects of the Rafferty dam. Mr. Justice Muldoon soundly rejected that argument and went on to say:[62]

> If there be anyone who ought scrupulously to conform to the official duties which the law casts upon him or her in the role of a high State official, it is a Minister of the Crown. That is just plainly obvious.
>
> But there is an irony in these proceedings which could make a cynic cackle with glee. In the first place, because the Minister did not embrace willingly the EARP Guidelines prior to April, 1989, and even subsequently, as this Court finds, the devolution of events described in section 3 of the Guidelines is now savagely distorted. ...

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[60]Section 3.

[61]Supra, n.45.

[62]Supra, n. 44 at 22.

> The evidence discloses that construction is well under way, so there is little doubt that irrevocable decisions have long since been taken while the **EARP Guidelines** have been circumvented. In effect this appears to be the principal reason for counsel's asking the Court to exercise its discretion in favour of dismissing the applications for relief which the applicants with their perfectly solid standing, have brought against the Minister.

The lesson from judicial commentary like this is that the duty to apply the Process early is taken seriously by the courts and late application will not be overlooked simply because "irrevocable decisions" have clearly been made and acted upon.[63]

Leaving aside the question of timely application, the initiating department is required to take into consideration:[64]

1. The potential environmental effects of the proposal. Of interest is the use of the word "effects" rather than "implications", as in section 3. While this may be of little significance, it further complicates interpretation. Of greater importance, perhaps, is the absence of the word "adverse". Unlike section 12, which requires initiating departments to "determine" the existence of "potentially adverse environmental effects", the duty here appears to be much broader.

2. The social effects directly related to those environmental effects, including any effects outside of Canada. The constitutional authority of the federal government to review and take into account non-environmental matters, like the social or economic im-

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[63]It is doubtful, however, that initiating departments alone can control the timing of the Process. For example, if the Process applies to a private project undertaken in a province which does not involve federal lands, money or regulatory decision making, federal departments are seldom advised of the proposal early in the planning process. In fact, it is not uncommon, according to Regional staff, that "notice" of a proposal comes in the form of an article in the local newspaper. Without the cooperation of non-federal proponents and provincial regulators, application of the Process in the manner intended by section 3 of the EARP Guidelines Order results in a dilemma for initiating departments, who then run the risk of censure by the courts.

[64]Section 4.

pact of proposals, is questionable. According to one legal analyst:[65]

> Here we can be unequivocal. The statutory mandate for the EARP Guidelines Order contains no reference to this type of impact and even if the Guidelines Order binds federal agencies, the attempt to require private proponents to prepare socio-economic impact assessments is ultra vires.

The accuracy of this analysis will likely be confirmed or denied by the anticipated decision of the Supreme Court of Canada in the Oldman case.[66]

3. The concerns of the public about the proposal and its potential environmental effects. The existence of public concern is the basis for a referral of a proposal by the initiating department for a public review by a panel (s.13). Yet despite the duty to take public concerns into account, there is nothing in the EARP Guidelines Order which requires the initiating department to release information to the public or solicit their views until after the initial assessment decision has been made (s.15). The existence of a duty to solicit public views and concerns about a proposal is hinted at in section 18(b) which makes it the responsibility of FEARO to:

> assist the initiating department in the provision of information on and the solicitation of public response to proposals early enough in the planning stage that irrevocable decisions will not be taken before public opinion is heard;...

The apparent contradiction between section 15 and sections 4 and 18 should, arguably, be resolved in favour of a positive duty by the initiating department to actively solicit public opinion before making a decision under section 12. It should follow, therefore, that information about a proposal will have to be released early on so that the public has a chance to reach an informed opinion.

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[65]P.S. Elder, supra, n.29.

[66]Supra, n.12.

4. Subject to the approval of the Minister of the Environment and the Minister of the initiating department, consideration of other matters like the socio-economic effects of, and need for, a proposal.[67]

If the initial assessment reveals "significant implications", section 3 requires the initiating department to refer the proposal to the Minister of the Environment for public review by a panel. In this instance, too, the difference in wording with section 12 is troublesome. Are only potentially adverse environmental effects to be considered "significant implications" ? This issue has not yet been considered by the courts, however, it may be that an initiating department can be ordered to refer a proposal for public review by a panel, pursuant to section 3, even if there are no potentially adverse environmental effects which are significant within the meaning of section 12.

In addition to the general duty to ensure the timely assessment of proposals for which it is the decision making authority, initiating departments are also required to:

1. Avoid duplication of public review, if the proposal is otherwise subject to environmental regulation. The argument that the application of the Process would result in the duplication of other assessment processes has been raised in numerous cases, [68] with little success. It may be that the argument is not well founded, as section 5(2) makes it clear that duplication is to be avoided, not by abandoning the Process, but by using :

> ...a public review under the Process as a planning tool at the earliest stages of development of the proposal rather than as a regulatory mechanism and make the results of the public review available for use in any regulatory deliberations respecting the proposal.

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[67]The comments made in relation to item 2 apply equally here.

[68]See, for example, Friends of the Oldman River Society v. Minister of Transport et al., supra, n.12.

2. In cooperation with FEARO, develop two lists: one setting out the types of proposals which would not produce any adverse environmental effects and can therefore be excluded from initial assessment, and the other setting out the kinds of proposals having significant adverse environmental effects which must be automatically referred for public review by a panel.[69]

3. In cooperation with FEARO, develop criteria by which to determine the "significance" of potential environmental effects for the purpose of making a decision under section 12.[70]

4. In consultation with FEARO, establish written procedures to be followed in making a determination under section 12.[71]

5. Provide FEARO with information, on a regular basis on the implementation of the Process with respect to the proposals for which it is the decision making authority.[72]

6. Ensure that federal-provincial, territorial and international agreements reflect the principles of the Process with respect to proposals for which it is the decision making authority.[73]

7. Include estimates of the resources needed to carry out the Process with respect to proposals in program forecasts.[74]

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[69]Section 11.

[70]Section 12(e).

[71]Section 16.

[72]Section 16.

[73]Section 17.

[74]Section 17.

Having met all these general duties, an initiating department is required to discharge other Process responsibilities on a proposal by proposal basis. These responsibilities will be discussed in relation to the four stages of the Process.

Initial Assessment Stage. In this stage of the Process, an initiating department must identify and study the potential environmental effects of a proposal and, on the basis of that assessment, make a decision about it. To do this, a department must:[75]

1. Identify a proposal as one to which the Process applies.

2. Determine that, within the meaning of the EARP Guidelines Order, it has decision making authority with respect to the proposal.

3. Consult with other federal departments to determine the existence of other "initiating departments". If so, to decide upon the division of responsibilities.

4. Determine whether the proposal is of a type on its exclusion or automatic referral list.

5. If not, determine the existence and nature of potentially adverse environmental effects.

6. Determine whether the potentially adverse environmental effects are significant or insignificant.

7. Determine whether any potentially significant adverse environmental effects can be rendered insignificant through mitigation measures achievable with known technology.[76]

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[75]Section 12.

[76]See Canadian Wildlife Federation et. al. v. Minister of the Environment et al., supra, n.45.

8. Determine the existence and nature of public concern about the proposal and its environmental effects.

Having made these determinations, an initiating department must then make a decision according to the categories set out in section 12. These are:

1. If a proposal is of a type on the exclusion list, allow the proposal to proceed, unless section 13 applies and public concern is such that a public review by a panel is "desirable".

2. If a proposal is of a type on the automatic referral list, refer the proposal to the Minister of the Environment for public review by a panel.

3. If the potentially adverse environmental effects are insignificant or can be rendered insignificant through the application of known technology,[77] allow the proposal to proceed with or without mitigation as the case may be.

4. If the potentially adverse environmental effects are unknown, either refer the proposal for public review by a panel or undertake further study and subsequent reassessment.

5. If the potentially adverse environmental effects are significant, refer the proposal to the Minister of the Environment for public review by a panel.

6. If the potentially adverse environmental effects are unacceptable, request that the proposal either be abandoned or modified and subsequently reassessed.

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[77]Ibid.

7. In any case, refer a proposal for public review by a panel if public concern about the proposal and its environmental effects is such that a public review is desirable.[78]

It is important to note section 10(2) which provides:

> Any decisions to be made as a result of the environmental screening or initial assessment referred to in subsection (1) **shall be made by the initiating department and not delegated to any other body.**(Emphasis added)

Finally, after making a decision pursuant to sections 12 or 13 but before implementing any mitigation or compensation measures (if applicable), the initiating department must ensure that the public has access to and an opportunity to respond to the proposal.[79]

Post Initial Assessment Stage. In the event that the initiating department determines that mitigation or compensation measures could render potentially adverse environmental effects insignificant, it must ensure that such measures are implemented.[80] The difficulty in meeting this responsibility in the absence of regulatory or other enforcement authority has been discussed previously.[81]

Review By A Panel Stage. In addition to making its own senior officials and expert staff available to make presentations or to respond to questions within its decision making authority, the initiating department must "ensure" that the responsibilities of the proponent with respect to the panel review are fulfilled.[82] In the absence of the authority to compel a

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[78]Whether a public review of a proposal is "desirable" is a matter of opinion to be determined by the Minister of the Environment, in his discretion. Although that discretion must be exercised reasonably and in good faith taking into account relevant considerations, the court will not substitute its own opinion for that of the Minister. **Earl Cantwell et al.v. The Minister of the Environment et al.**(January 18, 1991, Ottawa) Federal Court Trial Division Action Number T-2975-90.

[79]Section 15.

[80]Section 14.

[81]See, infra, at 21.

[82]Section 33.

private proponent to meet its obligations, this would seem to mean that the initiating department would have to assume the work of a proponent to fill the breach.

The Minister of the initiating department is directly responsible for assisting the Minister of the Environment with the development of terms of reference for the panel review.[83]

Post Panel Review Stage. Beyond the duty of its Minister to make the report of a panel available to the public, a duty shared with the Minister of the Environment, the initiating department must, without interfering with its own regulatory responsibilities:[84]

1. decide, in cooperation with any other federal department (etc.) to whom the recommendations of a panel are addressed, the extent to which the recommendations should become a requirement of the Government of Canada prior to authorizing the commencement of a proposal, [85]

2. ensure, in cooperation with others concerned with the proposal, that any decisions made by the appropriate Ministers as a result of the recommendations of a panel are incorporated into the design, construction and operation of that proposal and that suitable implementation, inspection and environmental monitoring programs are established,[86] and

3. determine the manner in which any such decisions are to be made public.

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[83]Section 26.

[84]Section 33.

[85]The intent of this subsection is not entirely self-evident and appears to assume that proposals will not be "commenced" until the Process is complete. Recent experiences with the environmental impact assessment of the Rafferty and Oldman dams makes it evident that such an assumption is optimistic. Presumably, this subsection is directing the initiating departments to use the results of a public review by a panel to improve the nature of federal regulatory activities.

[86]Just how an initiating department is supposed to accomplish this in the absence of regulatory control or other enforcement authority is not known. The comments made in relation to section 15 apply equally here. See text and notes, supra, at 21.

(c) The Federal Environmental Assessment Review Office

FEARO's role in the Process is primarily to provide support for the other players; initiating departments and panels, in particular.

With respect to the first, FEARO's duties are:

1. to provide procedural guidelines for the initial assessment of proposals,[87]

2. to assist with the development of exclusion lists, automatic referral lists and criteria to be used in making a determination pursuant to section 12,[88]

3. to assist in the provision of information on and soliciting public response to proposals early enough in the planning stage that irrevocable decisions will not be taken before public opinion is heard, [89]

4. to publish public information provided to FEARO by initiating departments about proposals,

5. to generally assist in the development and installation of implementation procedures,[90] and

6. to prepare procedural guidelines for use by panels in preparing their own detailed operating procedure.[91]

In addition, section 18(d) requires FEARO to inform the Minister of the Environment, by way of a public report, on the implementation of the Process by initiating departments.

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[87]Section 18(a).

[88]Sections 11, 12(e).

[89]Section 18(b).

[90]Section 18(a).

[91]Section 27(2).

In preparation for and throughout a public review by a panel, the role of FEARO is to:

1. provide support staff, logistical and administrative services for both the review and the public information program which preceeds it,[92]

2. prepare terms of reference for the review on behalf of the Minister of the Environment,[93]

3. identify potential panel members and arrange for their services,[94] and

4. where appropriate, to negotiate provincial or territorial participation in the review.[95]

The Executive Chairman of FEARO or his delegate is generally the Chairman of a panel and is responsible for appointing the Executive Secretary for a panel.[96]

Finally, it should be noted that, pursuant to section 32, FEARO has the authority to modify the requirements of a public review by a panel as set out in sections 21 -31 of the EARP Guidelines Order, if required to meet special circumstances.

(d) Other Departments

Other federal departments having "specialist knowledge or responsibilities" relevant to a proposal are required by section 19 to:

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[92]Section 24.

[93]Section 35.

[94]Ibid.

[95]Section 35. FEARO also has the authority to negotiate federal participation in non-federal reviews.

[96]Section 23.

1. upon request, provide the initiating department with available data, information or advice, and

2. as appropriate, advocate the protection of the interests for which they have responsibility.[97]

The same sort of responsibility is set out in section 36, in relation to public reviews by a panel. That section provides:

> In a public review, it is the role of every department that has specialist knowledge or responsibilities relevant to a proposal to:
>
> (a) provide to the panel and any other participants in the public review any available data, information or advice that is requested from them; (Emphasis added)
>
> (b) provide experts at public hearings of the panel to make presentations or to respond to questions; and
>
> (c) where appropriate, advocate the protection of the interests for which they have responsibility.

Although both sections refer to the "role" of other departments, the courts have understood it to be a "responsibility".[98]

(e) Minister of the Environment

Like the Ministers of any federal department undertaking or having decision making authority with respect to a proposal, the Minister of the Environment is responsible and accountable for the duties of, respectively, a proponent and an initiating department.

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[97]With respect to Environment Canada this should refer to those responsibilites identified by the DOE Act.

[98]Friends of the Oldman River Society v. Minister of Transport et al., supra, n.12.

The Minister of the Environment, however, has additional responsibilities. These are:

1. to establish a panel to publicly review proposals referred by initiating departments by appointing the members thereof,[99]

2. in consultation with the Minister of the initiating department, issue terms of reference for a panel review,[100] and

3. along with the Minister of the initiating department, make the report by a panel available to the public.[101]

Although not required to, it seems as though the Minister of the Environment (and other "appropriate" Ministers) is expected to make decisions on the basis of the panel's recommendations and conclusions. As previously noted, section 33 gives to initiating departments the responsibility to ensure that "any decisions made by the appropriate Ministers" are incorporated (etc.). As the EARP Guidelines Order does not authorize decision making by the Minister of the Environment (or any other) outside of the Process itself, this presumably relates to decisions made under the authority of other legislation.

(f) Panels

With respect to a particular proposal referred for public review, the responsibilities of a panel established for that purpose are:

1. to conduct a public information program to advise of its review,[102]

2. to ensure that the public has access to all relevant information, [103]

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[99]Section 21.

[100]Section 26(1).

[101]Section 31(2).

[102]Section 28(1).

[103]Section 28(1)(2)

3. to establish detailed operating procedures, in accordance with procedural guidelines issued by FEARO,[104]

4. to conduct a public review of a proposal in accordance with the terms of reference issued by the Minister of the Environment,[105] and

5. to prepare a report containing its conclusions and recommendations for decisions by appropriate Ministers and to submit that report to both the Minister of the Environment and the Minister of the initiating department.

Pursuant to section 30(1), a panel **may** prepare Guidelines for an Environmental Impact Statement to be prepared by a proponent.

4. THE PROPOSED CANADIAN ENVIRONMENTAL ASSESSMENT ACT (CEAA)

4.1 Legislative History and Purpose

CEAA was introduced to Parliament on June 18, 1990 as Bill C-78 by the (then) Minister of the Environment, the Honourable Robert de Cotret. Since that time, the Bill has gone through second reading and is presently under consideration by an all party Parliamentary committee.[106]

Although Bill C-78 itself died on the order paper when the House prorogued, it is expected that CEAA will be reintroduced at either the first or third reading stage, with or without amendments, depending upon the intent of government and the willingness of members from other parties to pick up debate where it was left off.

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[104]Section 27(2).

[105]Section 21.

[106]The Committee has finished hearing from witnesses and is awaiting a response from the government about amendments and regulations before proceeding with a clause by clause review.

The government is apparently intending to introduce numerous amendments and has yet to release key regulations which are required before the content and effect of the proposed legislation can be fully understood. For that reason, the information and comments contained in this Part are based upon the publicly available contents of CEAA as of May 15, 1991.

According to the federal government, CEAA is intended to integrate environmental considerations into all of its project planning, increase public participation in the assessment process, and "...bring an end to the uncertainty created by recent court decisions based on the 1984 Guidelines Order".[107]

It is clear that, once proclaimed, CEAA will replace the EARP Guidelines Order as the legislative authority for the federal environmental impact assessment process. However, section 69 of CEAA provides that The EARP Guidelines Order will continue to apply to any proposal:

1. which, prior to the coming into force of section 69, had been referred for public review and for which a panel has been established pursuant to an Order by the Minister of the Environment, and

2. for which an initial assessment was begun before section 69 was proclaimed in force; except that, should such a project be referred to the Minister of the Environment for public review, CEAA applies and the Minister may refer the project for mediation or review in accordance with the terms of CEAA.

Unlike the EARP Guidelines Order, the purposes of CEAA need not be inferred. Instead, the Preamble to the proposed legislation sets out the general intent of the government in enacting CEAA and section 4 identifies its specific purposes. These are:

1. to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them,

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[107]Statement by the Honourable Robert de Cotret, (then) Minister of the Environment Introducing the Canadian Environmental Assessment Act, June 18,1990.

2. to encourage responsible authorities to take actions that will promote and maintain a healthy environment and a healthy economy, and

3. to ensure that serious adverse environmental effects of projects to be carried out in Canada or on federal lands do not occur outside the jurisdictions in which the projects are carried out.

Although sections setting out the purpose or intent of legislation do not, generally, create rights or impose duties, the courts do use such provisions as guides or aids to interpretation.

4.2 CEAA : An Overview

The environmental impact assessment process created by CEAA (the "CEAA Process") continues the principle of "self-assessment". Under CEAA, an environmental assessment of a "project" is required where a "federal authority" :[108]

1. is the "proponent" and does anything committing the government to the project,

2. makes a financial contribution other than a tax concession (unless the concession is for the purpose of enabling a specific project to proceed),

3. has administration of "federal lands" and disposes of those lands for the purpose of enabling a project to go ahead, or

4. issues a permit, licence or approval under existing legislation which is to be identified in regulations, as yet not available.

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[108]Section 5. As defined in section 2, "project" means a physical work or activity that a proponent proposes to construct (etc.). A "federal authority" is also a defined term and the definition excludes particular categories or types of federal officials, boards and agencies, like certain Crown corporations, harbour boards (etc.).

(a) Application

If a federal authority does (or is) any of these things in relation to a project, it becomes a "responsible authority" who must:[109]

> ensure that an environmental assessment of the project is conducted as early as practicable in the planning stages of the project.

Section 6 sets out the circumstances in which the CEAA Process does not apply. It does not apply to:

1. Projects described on an exclusion list.[110] Section 55 gives to the Governor General in Council (Cabinet) the power to enact regulations creating three different kinds of exclusion lists:

   (a) projects or classes of projects which are likely to result in negligible environmental effects,

   (b) projects or classes of projects where the contribution of the responsible authority is minimal and

   (c) projects or classes of projects for which an environmental assessment would be inappropriate for reasons of national security.

2. Projects to be carried out in response to circumstances which constitute, in the opinion of the responsible authority, an emergency and the carrying out of the project would serve the interests of public health or safety.

3. The project is to be carried out during a national emergency for which special measures have been taken under the **Emergencies Act**.

Pursuant to section 55(1)(i) Cabinet also has the authority to enact regulations "varying or excluding" any procedure or requirement of the environmental assessment process for the "purpose of adapting the process to responsible authorities or any class of responsible

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[109]Section 7.

[110]These lists are not yet available.

authorities" with respect to certain types of projects like, for example, projects to be carried out on Crown lands subject to the Indian Act.[111]

Although the true scope of CEAA will not be known until further details are provided in regulations, it is clear that the CEAA Process will apply to fewer projects and project types than the process established by the EARP Guidelines Order. This may be of great comfort and assistance to federal departments who now find it impossible to understand and meet the latter, given present resources.

(b) The CEAA Process[112]

Although the content of CEAA is likely (and expected) to change from that given in Bill C-78, it is unlikely that the basic roles and responsibilities of various federal authorities and departments will be dramatically altered. What follows is an overview of the roles and responsibilities of three key players in the CEAA Process: (1) responsible authorities, (2) the Minister of the Environment and (3) the Canadian Environmental Assessment Agency, through the six different stages or steps of the CEAA Process.[113] These stages are:

1. identification and classification,[114]
2. screening,[115]
3. mandatory study,[116]

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[111]See s.55(1)(i)(i-vi).

[112]Details of the roles and responsibilities arising under the CEAA Process are presented in table format in Appendix III.

[113]Section 10 of CEAA identifies only three stages to the environmental assessment process: screening, mediation or review and follow up. To understand the nature and timing of duties, however, the CEAA Process is discussed here as having six discrete steps or stages.

[114]This stage is not recognized as a discrete step by CEAA, but refers to duties set out in ss 6, 13 and 17.

[115]Sections 13-16.

[116]Sections 17-20.

4. mediation and review,[117]

5. post mediation and review,[118] and

6. follow up.[119]

Identification and classification. Pursuant to section 13, a responsible authority is required to ensure that a project not on an exclusion or a mandatory study list is screened and that a screening report is prepared. In order to meet this obligation, a federal authority must first:

1. identify the project as being of a type to which the CEAA Process applies, and

2. identify its role in relation to the project as one coming within section 5, and

3. make a decision about whether the project is or is not described by an exclusion or mandatory study list.

Screening. The duties of a responsible authority in undertaking a screening of a project are set out in sections 13-16, and generally require the "screening" of a project. This requirement appears the equivalent of an "initial assessment" under the EAR Process. The scope of the screening is given in section 11 which requires that:

> Every screening or mandatory study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:
>
> (a) the environmental effects of the project including the environmental effects of malfunctions or accidents ... and any cumulative environmental effects likely to result from the project in combination with other projects...;

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[117]Sections 25-33.

[118]This stage is not identified by CEAA as a separate stage or step but relates to the duties set out in s.34.

[119]Section 35.

(b) the significance or ... the seriousness of those effects;

(c) comments concerning those effects received from the public...;

(d) measures that are technically and economically feasible and that would mitigate any significant... or serious adverse environmental effects of the project.

In addition, CEAA requires the responsible authority to prepare a screening report and to ensure that any studies or information required for the purposes of screening are undertaken or collected.[120] Once the report is completed, the public is to be given an opportunity to examine and comment on the screening report and any "record filed in the public registry".[121]

Taking into consideration any comments filed by the public, the responsible authority is then required to take one of the courses of action set out in section 16(1). The options are:

1. allow the project to proceed, ensuring that any mitigation measures required are implemented, if significant adverse effects are unlikely or can be "mitigated";[122]

2. refer the project to the Minister of the Environment for mediation or review if significant adverse effects (which may not be mitigable) are likely or if public concern so warrants ;

3. fail to take any action that would allow the project to proceed, in whole or in part, if it is likely to cause significant adverse effects;

In addition to these mandatory duties, the responsible authority has the discretion to do the following:

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[120]Section 13(2).

[121]Section 16(3).

[122]"Mitigation" is a defined term and means, in part, the elimination, reduction or control of the adverse environmental effects of a project.

1. at any time, refer a project to the Minister of the Environment for mediation or review if it is likely to result in significant adverse effects which may not be mitigable or if public concern so warrants, [123]

2. terminate the assessment of a project if it decides not to exercise any power (etc.) with respect thereto. [124]

The work of screening projects should be significantly reduced through the use of "class" and "previously conducted" screening reports. Pursuant to sections 14 and 15, a responsible authority may use such reports providing that:

1. if a class screening report is used, adjustments are made to take into account local circumstances and cumulative effects,[125] and

2. if a previously conducted screening report is used, adjustments are made to take into account any significant changes to the circumstances of a project.[126]

Mandatory Study. For all projects described in a mandatory study list, it is the duty of the responsible authority to:[127]

1. ensure that a mandatory study is conducted, having regard to the requirements of section 11,

2. ensure that a mandatory study report is prepared and submitted to the Canadian Environmental Assessment Agency (the "Agency"),

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[123]Section 21. The Minister of the Environment has the same authority pursuant to s.24.

[124]Section 22.

[125]Section 14(4).

[126]Section 15(2).

[127]Sections 17 and 18.

3. refer the project to the Minister of the Environment for mediation or review, and

4. if a previously conducted mandatory study is used, as provided for in section 18, ensure that all necessary adjustments are made to take into account significant changes in the circumstances of the project.

Upon receipt of the mandatory study report, the Agency is required by section 19 to publish a notice stating:

1. the date upon which the mandatory study will be made available to the public,

2. the place at which copies may be obtained, and

3. the deadline and address for filing comments about the conclusions and recommendations of the report.

It is up to the Minister of the Environment to make the next decision. After taking into account the mandatory study report and public comments filed with the Agency, the Minister is required by section 20 to:

1. refer the project to mediation or review if it is likely to cause significant adverse effects that may not be mitigable or public concerns so warrant, or

2. refer the project back to the responsible authority for decision making pursuant to section 34(1)(a) if the project is unlikely to result in significant adverse effects or if any such effects can be mitigated.

In the event that a responsible authority decides not to exercise any power (etc.) with respect to a project referred for mediation or review, section 23 gives the Minister the authority to terminate the assessment of it.

It is interesting to note section 12 which allows the responsible authority to:

...delegate any part of the screening or mandatory study of a project, including

the preparation of the screening report or mandatory study report, but shall not delegate the duty to take a course of action pursuant to subsection 16(1) or 34(1).

That section further provides:

...a responsible authority shall not take a course of action pursuant to subsection 16(1) or 34(1) unless satisfied that any duty or function delegated... has been carried out in accordance with this Act and the regulations.

Mediation and Review. Pursuant to section 25, the Minister of the Environment "shall" refer a project to mediation if the Minister is satisfied that the parties directly affected by or who have a direct interest in the project have been identified and are willing to participate in mediation through representatives, and if mediation is likely to achieve results satisfactory to all the parties. Otherwise, a project must be sent for review by a panel. In either case the Minister appoints mediators, chairpersons, members of panels and participants in mediation [128] and establishes terms of reference for their use. The Agency is required to provide administrative support for mediators and review panels, pursuant to section 59(1)(a).

Should it become apparent that mediation is unlikely to achieve results satisfactory to all participants, the Minister of the Environment has the authority to, at any time, terminate the mediation and refer the project for review by a panel.[129]

Once the mediator or a panel has submitted its report, the Minister must make it available to the public and provide notice to that effect.[130]

Post Mediation or Review. Upon referral of a project back to the responsible authority by the Minister of the Environment or after the submission of a report by a mediator or a panel, section 34 requires the responsible authority to take one of the following courses of action:

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[128]Only if required, s.27.

[129]Section 30.

[130]Section 33.

1. take any action necessary to allow the project to proceed, ensuring the implementation of any necessary mitigation measures, if the project is unlikely to cause significant adverse effects or if such effects can be mitigated or justified, or

2. fail to take any action that would allow the project to proceed in whole or in part if the project is likely to result in significant adverse effects that cannot be mitigated or justified.

In any event, the responsible authority may issue a certificate indicating that the CEAA Process has been completed.[131]

Follow Up Program. If a responsible authority allows a project to proceed, it must :

1. design an appropriate follow up program and arrange for implementation, and

2. provide public notice of (a) the course of action chosen, (b) mitigation measures, (c) the incorporation of recommendations from the reports of a mediator or a panel, and (d) the follow-up program which is to be implemented.[132]

General and Ongoing Powers and Responsibilities. In addition to project specific responsibilites, the Minister of the Environment and the Agency have ongoing duties and discretionary powers which relate to the overall CEAA Process or to environmental assessment generally.

The Minister of the Environment may:

1. Establish research and advisory bodies.[133]

2. Issue guidelines and codes of practice to assist in the assessment of environment effects of projects.[134]

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[131]This authority is apparent from s. 36.

[132]Section 35.

[133]Section 54(1)(b).

[134]Section 54(1)(a).

3. Enter into agreements or arrangements with respect to the assessment of environmental effects.[135]

For its part, the Agency shall: (a) provide administrative support for any research or advisory body that may be established by the Minister of the Environment, and (b) provide information or training to facilitate the conduct of environmental assessments [136] and may:[137]

1. undertake studies or activities or conduct research relating to environmental assessment,

2. advise persons and organizations on matters relating to environmental assessment, and

3. examine and from time to time report to the Minister of the Environment on the implementation of the CEAA Process by responsible authorities.

4.3 CEAA: Departures from the EARP Guidelines Order

In many ways the environmental impact assessment process created by CEAA modifies and adds to the existing process under the EARP Guidelines Order rather than substantially altering it. There are, however, some new ideas and much needed improvements introduced by the proposed legislation. What follows is a brief discussion of these modifications and additions.

(a) Modifications

CEAA introduces two "new" players into the environmental impact assessment process: "responsible authorities" and "the Canadian Environmental Assessment Agency". Although the titles are new, the roles and responsibilities given to each of them makes it quite clear that

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[135]Section 54(1)(c)(d).

[136]Section 59(1)(b)(c).

[137]Section 59(2)(a)(b)(d).

today's "initiating department" is tomorrow's "responsible authority" with "FEARO" transformed into the "Canadian Environmental Assessment Agency".[138]

As discussed above, CEAA takes a different approach to, and narrows the scope of, the application of the environmental impact assessment process. New exclusion lists, to be enacted as regulations by Cabinet, will further reduce the number of projects which must be assessed by the federal government.

More particulars are provided about the purpose and nature of the various stages of the CEAA Process. For example, section 11 clearly sets out the considerations which should be taken into account during screening, mediation or review by a panel.

Finally, the criteria for decision making have been modified somewhat, so that under CEAA the Minister of the Environment has the discretion to refer a project, likely to have significant adverse environmental effects, back to the responsible authority for decision making, as an alternative to mediation or review, provided that any such effects are mitigable.[139] Under the EARP Guidelines Order (section 12(c)) the potentially adverse environmental effects likely to result from a proposal must be **insignificant** or **mitigable** to escape public review by a panel.

(b) Additions

CEAA introduces several important additions to the environmental impact assessment process. These include:

1. The mandatory requirement for a responsible authority to decide upon a course of action. Sections 16(1) and 34(1) specifically require a decision by a responsible authority following, respectively, the conclusion of project screening or mediation or review. This is a departure from the EARP Guidelines Order in which neither the requirement nor the authority to make a final decision was assigned to anyone.

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[138]With respect to the Agency, s. 68 provides that employees working for FEARO on the day preceding the day upon which the section creating the new Agency comes into force, are deemed to have been appointed as employees of that Agency.

[139]Section 20.

2. Prohibitions requiring that all project related activity by federal authorities stop until the CEAA Process has been completed. Sections 7(2), 9 and 12(2) provide:

> 7(2). A responsible authority shall not exercise any power or perform any duty or function referred to in section 5 in relation to a project unless it is satisfied that an environmental assessment of the project has been completed.
>
> 9. Where a project is described in the mandatory study list or is referred to mediation or a review panel, no federal authority shall exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part until the responsible authority has taken a course of action pursuant to paragraph 34(1)(a).
>
> 12(2). For greater certainty, a responsible authority shall not take a course of action pursuant to subsection 16(1) or 34(1) unless it is satisfied that any duty or function delegated pursuant to subsection (1) has been carried out in accordance with this Act and the regulations.

3. The ability of the Minister of the Environment to establish joint review panels with other jurisdictions, including provincial governments.[140] Pursuant to section 39, joint reviews "shall be deemed to satisfy any requirements of this Act and the regulations respecting assessments by a review panel".

4. The ability of the Minister of the Environment to substitute the assessment processes of other federal authorities for the panel review process established by CEAA.[141]

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[140]Section 37(2).

[141]Section 40.

5. The ability of the Minister of the Environment to establish a review panel to consider the environmental effects of projects not otherwise subject to the CEAA Process, under the following circumstances:[142]

> (a) a project undertaken in one province is likely to cause serious adverse environmental effects in another,
>
> (b) a project to be undertaken in Canada or on federal lands is likely to cause serious adverse environmental effects outside of Canada or federal lands,
>
> (c) a project to be carried out in Canada is likely to cause serious adverse environmental effects on federal lands or on lands in respect of which Indians have interests, and
>
> (d) a project to be carried out on reserve or other Indian lands is likely to cause serious environmental effects outside those lands.

6. The creation of a public registry through which the public may access project related information. Section 51 provides, in part:

> 51.(1) For the purpose of facilitating public access to records relating to environmental assessments, a public registry shall be established and operated in accordance with this Act and the regulations in respect of every project for which an environmental assessment is conducted.
>
> (2) The public registry in respect of a project shall be maintained
>
> (a) by the responsible authority from the commencement of the environmental assessment until any follow-up program in respect of the project is completed; and

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[142]Sections 43-45.

(b) where the project is referred to mediation or a review panel, by the Agency from the appointment of the mediator or members of the review panel until the report of the mediator or review panel is submitted to the Minister.

7. The ability of the responsible authority to issue a certificate indicating that the CEAA Process has been completed with respect to a particular project.[143]

8. The ability of the Minister of the Environment to issue Orders for the purpose of prohibiting a proponent from proceeding with a project to which the CEAA process does not apply but for which a review has been established pursuant to sections 43, 44 or 45.[144]

9. The ability of the Minister of the Environment to apply to the courts for an injunction to enforce compliance with any Order issued by the Minister.[145]

10. The restriction upon the ability of the courts to grant an application for judicial review where the only grounds for the application is defect in form or a technical irregularity.[146]

11. The ability of the Minister to establish research and advisory bodies or to issue guidelines and codes of practice as means through which to facilitate environmental assessments.[147]

12. The power of Cabinet to enact regulations respecting a number of important aspects of the CEAA Process.[148]

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[143]Section 36.

[144]Section 47.

[145]Section 48.

[146]Section 53.

[147]Section 54.

[148]Section 55.

5. THE LAW: COMMENTS AND CONCLUSIONS

In describing the nature and effect of law in general and the relationship of existing or proposed law to the Environmental Assessment Program, the intent of this Paper has been two-fold. Firstly, to provide information about the legal obligations and powers of federal government Ministers, departments and, ultimately, staff, and secondly, to impress upon those having responsibility or authority pursuant to the law, the necessity of complying with it.

Whether those who drafted the EARP Guidelines Order intended it to be enforceable through legal action by third parties is irrelevant. The federal courts of Canada have consistently found the EARP Guidelines Order to be a law of general application which is binding upon all those to whom it applies.[149] Unless the Supreme Court of Canada decides otherwise or until replaced with the coming into force of CEAA, the law of the federal environmental impact assessment process as established by the EARP Guidelines Order must be followed.

The EARP Guidelines Order is not the only law of relevance to the Environmental Assessment Program. As discussed in Part 2, the **Department of the Environment Act** requires certain action by the Minister of the Environment and may well be enforceable against him.

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[149]Canadian Wildlife Federation Inc. et. al. v. The Minister of the Environment et al., supra, n.5.

APPENDIX I

THE CASES

JUDICIAL CONSIDERATION OF THE EARP GUIDELINES ORDER

APPENDIX I: THE CASES
JUDICIAL CONSIDERATION OF THE EARP GUIDELINES ORDER

The following principles are based upon the Reasons for Judgment given by the courts in consideration of the nature and effect of the EARP Guidelines Order in some recent cases.

1. **Canadian Wildlife Federation Inc. et al.. v. Minister of the Environment et al..** [1989] 4 W.W.R. 526 (F.C.T.D.)

The EARP Guidelines Order is an enactment or Regulation as defined in section 2 of the federal **Interpretation Act.** It is therefore is not a mere description of a policy or a program; instead it may create rights which may be enforceable by way of **mandamus.**

Compliance with the environmental impact assessment process is a duty owed to the public.

The EARP Guidelines Order applies to any proposal which may have an environmental effect on an area of federal responsibility.

Compliance with the EARP Guidelines Order is a prerequisite to federal decision making under the **International Rivers Improvements Act.** Failure to comply results in decision making in excess of jurisdiction.

2. **Saskatchewan Water Corporation v. Canadian Wildlife Federation Inc. et.al.**(1989), 99 N.R. 72, 4 C.E.L.R. (N.S.) 1, (F.C.A.D.) affirming [1989] 3 C.E.L.R. (N.S.) 287,[1989] 4 W.W.R. 526 (F.C.T.D.)

Section 6 of the **Department of the Environment Act** is unquestionably capable of supporting a power to make binding subordinate legislation.

The EARP Guidelines Order is a law of general application which binds all those to whom it applies, including the Minister of the Environment.

3. **Canadian Wildlife Federation Inc. et.al. v. Minister of the Environment et.al.**(1989) 4 C.E.L.R. (N.S.) 201, 31 F.T.R. 1 (F.C.T.D.)

The EARP Guidelines Order recognizes only two types of adverse environmental effects: insignificant and significant.

An Initial Environmental Evaluation report may be reviewed by the courts to determine the nature of decision making. Where gaps in technical information exist, the Court may conclude that in reaching a decision the decision maker failed to take into account relevant environmental considerations and therefore acted in excess of jurisdiction.

"Mitigation" of potentially adverse environmental effects, within the meaning of section 12 of the EARP Guidelines Order, means that any such effects must be capable of mitigation through known technology.

4. **Tetzlaff v. The Minister of the Environment et.al.**(1990), unreported, Court File A-48-90 (F.C.A.D.)

Section 14 of the EARP Guidelines Order puts an obligation on initiating departments to ensure that mitigation and compensation measures are applied to prevent potentially adverse environmental effects from becoming significant.

The EARP Guidelines Order does not create an obligation not to proceed with a proposal until the environmental impact assessment process has been completed.

5. **Friends of the Oldman River Society v. Minister of Transport et.al.**[1990] 2 F.C. 18 (F.C.A.D.)

The EARP Guidelines Order creates a "super added" duty to the exercise of any other statutory power. Ministers have a positive obligation to comply with it.

The word "proposal" as defined in the EARP Guidelines Order has a much broader meaning than its ordinary one.

Applications or requests for authorizations are only a means of drawing the attention of a Minister to a "proposal". Duties under the EARP Guidelines Order arise if a proposal is brought to a Minister's attention through other means, providing that specific action is available pursuant to a statute administered by the Minister.

A request from a member of the public to the Minister of Fisheries and Oceans asking that the Minister exercise his power pursuant to section 37 of the Fisheries Act, is sufficient to trigger the EARP Guidelines Order.

Once a proposal has been brought to the attention of one federal department, duties under the EARP Guidelines Order arise with respect to all other federal departments.

6. **Naskapi-Montagnais Innu Association v. Minister of National Defence** (1990) unreported, Reasons for Order, Court File No. T-450-90, April 12, 1990.

The EARP Guidelines Order cannot be the authority for "stop" orders bringing projects to a standstill until environmental assessment has been completed. Nothing in the EARP Guidelines Order requires that.

Although the act of entering into or approving an international agreement or treaty may not itself trigger the EARP Guidelines Order, subsequent steps to implement the agreement may.

7. **Angus et al.. v. The Queen et al..** (1990) 4 C.E.L.R. (N.S.) 274 (F.C.T.D.)

The EARP Guidelines Order does not apply to Cabinet orders.

8. **Cantwell et al.. v. The Minister of the Environment et al..** (1991) unreported Reasons for Order Court No. T-2975-90

In judicial review of administrative action, as here through an application for certiorari, the role of the Court is not that of an appellant body reviewing the merits of the administrator's decision. It is not the Court's function to determine whether the decision in question is right or wrong; rather the Court is concerned only with the question whether the administrator has acted in accord with the law.

The discretion vested in the Minister of the Environment in section 13 of the EARP Guidelines Order is not absolute. It must be exercised reasonably and in good faith taking into account relevant considerations, having regard to the purpose of the EARP Guidelines Order. However, where the Minister has not clearly relied only upon irrelevant considerations, the courts will not set aside a decision through the issuance of an order of certiorari.

APPENDIX II:

THE ENVIRONMENTAL ASSESSMENT AND REVIEW PROCESS GUIDELINES ORDER

- THE PROCESS AND THE PLAYERS

WHO IS RESPONSIBLE	INITIAL ASSESSMENT STAGE	POST INITIAL ASSESSMENT STAGE	REVIEW BY A PANEL STAGE	POST PANEL REVIEW STAGE	GENERAL COMMENTS AND NOTES
PROPONENT			If required, prepare an Environmental Impact Statement, with supporting documents, in accordance with any terms of reference issued by the Panel reviewing the proposal (34(a)) Provide copies of the Environmental Impact Statement, and supporting documents in such languages and numbers required for the purposes of the public review (34(b)) Implement a public information program to explain the proposal and its potential environmental effects (34(c)) If required, provide additional information in such languages and numbers as necessary for the purposes of a public review (34(d)) Ensure that senior officials and expert staff are present at Panel hearings to make presentations and respond to questions (34(e))	Ensure that appropriate post-monitoring, surveillance and reporting, as may be required by the initiating department, are carried out (34(f))	This is in addition to the public information program by a Panel

* Numbers in ( ) refer to sections of the EARP Guidelines Order

WHO IS RESPONSIBLE	INITIAL ASSESSMENT STAGE	POST INITIAL ASSESSMENT STAGE	REVIEW BY A PANEL STAGE	POST PANEL REVIEW STAGE	GENERAL COMMENTS AND NOTES
INITIATING DEPARTMENT	Ensure, early in the planning stage, before irrevocable decisions are made, that the environmental implications of proposals for which it is the decision making authority are fully considered (3) General duty to: (ss 16/17) 1. Provide FEARO with information about the implementation of the Process with respect to proposals for which it is the decision making authority, on a regular basis 2. Ensure that federal-provincial, territorial and international agreements reflect the principles of the Process with respect to proposals for which it is the decision making authority 3. Include in its program forecasts, estimates of the resources necessary to carry out the Process Ensure that all proposals having significant environmental implications are referred to the Minister of the Environment for review by a Panel (3) To take into account the following factors when reviewing a proposal pursuant to s. 3: (4(1)) 1. Potential environmental effects 2. Social effects directly related to the potential environmental effects 3. Public concerns about the proposal and its potential environmental				

WHO IS RESPONSIBLE	INITIAL ASSESSMENT STAGE	POST INITIAL ASSESSMENT STAGE	REVIEW BY A PANEL STAGE	POST PANEL REVIEW STAGE	GENERAL COMMENTS AND NOTES
	effects; and 4. If approved by the Ministers (Env./Initiating Dept.), other matters like socio-economic effects, technology assessment and need for the proposal (4(2)) Attempt to avoid duplication of public reviews by providing information obtained through the Process to any regulatory deliberations respecting the proposal (5) Where more than 1 department has decision making authority, decide (cooperatively) how duties of an initiating department will be divided (9(1)) Develop, in cooperation with FEARO, two lists: (1) an exclusion list and (2) an automatic referral for review by a Panel list (11) Develop, with FEARO, written procedures to be followed when making a decision pursuant to s. 12 (16) In cooperation with FEARO, develop criteria to be used in making a determination pursuant to s. 12 (12(e)) *Assess each proposal for which it is the decision making authority to determine: (12) 1. If the proposal is of a type on the exclusion list or on the automatic panel review list 2. If the potential adverse environmental effects are insignificant or, if not insignificant,				*Although not required by law to do so, the Minister of the Environment has at least on one occasion ordered his Department to prepare a written "Initial Environmental Evaluation" as part of the initial assessment stage of the Process. In considering whether the Minister had erred in law by failing to refer the Rafferty dam proposal for public review by a Panel, the Federal Court Trial Division carefully reviewed the contents of that report. Finding gaps in technical information about environmental matters relevant to the review, the Court found that the Minister had exceeded his jurisdiction by failing to consider all relevant potentially adverse environmental impacts. The Court ordered the Minister to establish a Panel to review the proposal. This decision was upheld by the Federal Court of Appeal. Canadian Wildlife Federation et. al. v. Minister of the Environment et. al. (1989) 4 C.E.L.R. (N.S.) 201 (F.C.T.D.) Tetzlaff v. Minister of the Environment et. al., December 21, 1990 (F.C.A.D.)

WHO IS RESPONSIBLE	INITIAL ASSESSMENT STAGE	POST INITIAL ASSESSMENT STAGE	REVIEW BY A PANEL STAGE	POST PANEL REVIEW STAGE	GENERAL COMMENTS AND NOTES
	can be rendered so through known technology 3. If the potential adverse environmental effects are unknown 4. If the potential adverse environmental effects are significant 5. If the potential adverse environmental effects are unacceptable 6. The existence and nature of public concern *Make a decision: (ss 12, 13, 4(1)) 1. If on an exclusion list, or if the potential adverse environmental effects are insignificant or can be rendered insignificant through known technology, the proposal can proceed, with mitigation if required 2. If on an automatic panel review list, if potential adverse environmental effects are unknown or significant or if public concern warrants, refer to the Minister of the Environment for public review by a Panel 3. If the potential adverse environmental effects are unknown and the proposal is not referred for review by a Panel, require further study and reassessment 4. If the potential adverse environmental effects are unacceptable, modify the proposal and either reassess or abandon the proposal After making a decision pursuant to ss. 12 or 13 but before implementing	**Ensure that mitigation or compensation measures determined as being capable of preventing potentially adverse environmental effects from becoming significant are implemented (14)	Minister of the initiating department may assist in the preparation of terms of reference for Panel review of a proposal (26) Ensure that the responsibilities of the proponent in a Review are fulfilled (33(1)) Ensure that its own senior officials and staff make presentations and respond to questions for which it has responsibility (33(1))	Minister of the initiating department, with the Minister of the Environment, must ensure that the Panel's report is made public (31(2)) Without interferring with its own regulatory decision making and in cooperation with others: (33(1)) 1. Decide the extent to which Panel recommendations should become a requirement of the federal government before approving a proposal 2. Ensure that any decisions made by Ministers as a result of Panel recommendations are incorporated and that suitable implementation, inspection and environmental monitoring programs are established 3. Decide in what manner these decisions are to be made public	*Pursuant to s. 10(2): "Any decision to be made as a result of the...initial assessment...shall be made by the initiating department and not delegated to any other body. ** With respect to the duty to "ensure" the implementation of mitigation or compensation measures, it is not clear how this is to be achieved if the initiating department does not have a regulatory role in relation to the project or some other legislative authority through which to compel performance by non-federal proponents. Further, the Federal Court of Appeal recently held that the mitigation or compensation measures referred to in s. 14 must have the effect of rendering potentially adverse environmental effects insignificant. Tezlaff v. The Minister of the Environment et. al. Reasons for Judgment at 17.

WHO IS RESPONSIBLE	INITIAL ASSESSMENT STAGE	POST INITIAL ASSESSMENT STAGE	REVIEW BY A PANEL STAGE	POST PANEL REVIEW STAGE	GENERAL COMMENTS AND NOTES
	mitigation or compensation measures, ensure that the public has access to information on and an opportunity to respond to a proposal (15)				
OTHER DEPARTMENTS	Departments having specialist knowledge or responsibilities relevant to a proposal must: 1. If requested, provide the initiating department with available data, information or advice about regulatory requirements, environmental effects and the directly related social impact of the environmental effects 2. As appropriate, advocate the protection of the interests for which they have responsibility (19)		Departments having specialist knowledge or responsibilities relevant to a proposal must: 1. If requested provide the Panel and any participant in the Review with available data, information or advice 2. Provide experts at Panel hearings to make presentations or respond to questions 3. As appropriate, advocate the protection of the interests for which they have responsibility (36)		Although the EARP Guidelines Order speaks of the "role" of other departments, the Federal Court of Appeal found it to be a "responsibility". Friends of the Oldman River Society v. Minister of Transport et. al. (March 13, 1990) Once a proposal has been brought to the attention of one federal department, Process duties arise with respect to all other federal departments Friends of the Oldman River Society v. Minister of Transport (March 13, 1990) (F.C.A.D.)

WHO IS RESPONSIBLE	INITIAL ASSESSMENT STAGE	POST INITIAL ASSESSMENT STAGE	REVIEW BY A PANEL STAGE	POST PANEL REVIEW STAGE	GENERAL COMMENTS AND NOTES
FEARO	Arbitrate disputes between departments having decision making authority with respect to a proposal about the duties of "initiating department" to be performed by each of them (9(2))	Publish in summary form the public information provided to FEARO by an initiating department on proposals for which it is the decision making authority and for which a determination under s. 12 has been made (18)	Executive Chairman of FEARO, unless inappropriate, acts as the Chairman of a Panel and appoints the Executive Secretary of the Panel (23)		General duty to: (18) 1. Provide initiating departments with procedural guidelines for the assessment of proposals 2. Provide general assistance for the development and installation of implementation procedures 3. Inform the Minister of the Environment, in a report to be made public, on the implementation of the Process by initiating departments 4. Prepare guidelines for Panels (27(2)
	Assist departments in developing: (11, 16, 12(e)) 1. An exclusion list 2. An automatic referral for review by a Panel list 3. Written procedures to be followed in order to make a determination under s. 12 4. Criteria to be used in making a determination under s. 12		Provide Panel with: (24) 1. Support staff 2. Logistical and administrative services for the review and the public information program If required by special circumstances, may vary the requirements or procedures set out in ss. 21-31 (32) To: (35) 1. Prepare terms of reference to be issued by the Minister of the Environment for a Panel review 2. Identify potential Panel members and arrange for their services 3. Where appropriate to negotiate provincial or territorial participation in a Panel review, or federal participation in a provincial review (etc.)		
	Assist the initiating department in: (18) 1. Provision of information on proposals to the public early in the planning stage 2. Solicitation of public response to proposals, early in the planning stage				

WHO IS RESPONSIBLE	INITIAL ASSESSMENT STAGE	POST INITIAL ASSESSMENT STAGE	REVIEW BY A PANEL STAGE	POST PANEL REVIEW STAGE	GENERAL COMMENTS AND NOTES
MINISTER OF THE ENVIRONMENT			Appoint members of the Panel (21) In consultation with the Minister of the initiating department, issue terms of reference for a Panel review (26(1))	With the Minister of the initiating department, make a Panel report public. (31(2))	
PANEL			Conduct a public information program to advise of review (28(1)) Ensure the public has access to all relevant information (28(1)(2)) May prepare Guidelines for an Environmental Impact Statement prepared by a Proponent (30(1)) Establish detailed operating procedures (27(2)) Conduct a public review of a proposal in accordance with the terms of reference issued by the Minister of the Environment (21) Prepare a report containing its conclusions and recommendations for decisions by appropriate Ministers (31) Give that report to the Minister of the Environment and to the Minister of the initiating department (31)		

APPENDIX III:

THE (PROPOSED) CANADIAN ENVIRONMENTAL ASSESSMENT ACT:

ROLES AND RESPONSIBILITIES OF FEDERAL AUTHORITIES

* Based upon the contents of Bill C-78 as of May 15, 1991 ** Numbers in ( ) refer to sections of Bill C-78

STAGE	RESPONSIBLE AUTHORITY	MINISTER OF THE ENVIRONMENT	CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY
IDENTIFICATION AND CLASSIFICATION (Not identified as a separate stage in Bill C-78)	Identification of the role of a federal authority in relation to a project as one subject to the CEAA process (13) Classification of a project for which it is the responsible authority as one: 1. on an exclusion list and therefore excluded from the CEAA process (13, 6) 2. on a mandatory study list and therefore automatically referred for mediation or review (13, 17) 3. on neither list and therefore requires screening (13)		
SCREENING (ss 13-16)	Ensure that: (13, 14, 15) 1. a project requiring screening, is screened 2. a screening report is prepared 3. any studies and information required for the purposes of screening are undertaken or collected 4. if a class screening report is used, that adjustments are made to take into account local circumstances and cumulative effects into account 5. if a previously conducted screening report is used to make adjustments necessary to take any significant changes to the circumstances of a project into account Give the public an opportunity to examine and comment on the screening report and any record filed in the public registry (16(3))		

STAGE	RESPONSIBLE AUTHORITY	MINISTER OF THE ENVIRONMENT	CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY
	Taking into consideration any comments filed by the public: (s 16(1)(2)) 1. allow a project to proceed, ensuring that any mitigation measures required are implemented, if significant adverse effects are unlikely or can be mitigated 2. refer the project to the Minister of the Environment for mediation or review if significant adverse effects (which may not be mitigable) are likely or if public concern so warrants 3. fail to take any action that would allow the project to proceed, in whole or in part, if it is likely to cause significant adverse effects **May** at any time refer a project to the Minister of the Environment for mediation or review if it is likely to result in significant adverse effects which may not be mitigable or public concern so warrants (21) **May** terminate the assessment of a project if the responsible authority decides not to exercise any power (etc.) with respect thereto (22)	**May**, at any time, having consulted with the responsible authority, refer a project for mediation of review if it is likely to result in significant adverse effects or public concern so warrants (24)	

STAGE	RESPONSIBLE AUTHORITY	MINISTER OF THE ENVIRONMENT	CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY
MANDATORY STUDY (ss 17-20)	For all projects described in a mandatory study list: (17,18) 1. ensure that a mandatory study is conducted 2. ensure that a mandatory study report is prepared and submitted to the Agency 3. refer the project to the Minister of the Environment for mediation or review 4. if a previously conducted mandatory study is used, ensure that all adjustments, necessary to take into account significant changes in the circumstances of a project, are made	After taking into account the mandatory study report and public comments filed with the Agency: (20) 1. refer the project to mediation or review if it is likely to cause significant adverse effects that may not be mitigable or public concerns so warrant 2. refer the project back to the responsible authority for decision making, pursuant to s. 34(1)(a), if the project is unlikely to result in significant adverse effects or such effects can be mitigated May terminate the assessment of a project referred for mediation or review if the responsible authority decides not to exercise any power (etc.) with respect thereto (23)	Publish a notice containing: (19) 1. date upon which the mandatory study report will be available to the public 2. place at which copies may be obtained 3. deadlines and address for filing comments about the report

STAGE	RESPONSIBLE AUTHORITY	MINISTER OF THE ENVIRONMENT	CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY
MEDIATION AND REVIEW (ss 25-33)		Refer a project for mediation if satisfied: (25(b)) 1. parties directly affected or who have a direct interest in the project have been identified and are willing to participate through representatives 2. mediation is likely to produce a result satisfactory to all of the parties Refer a project for review by a Panel if any of the above conditions are not met (25(b)) May at anytime terminate mediation and refer a project for review by a Panel if mediation is unlikely to result in a satisfactory result for all the parties (29) Appoint the mediator and set the terms of reference for mediation (26) Appoint the Panel members, the chairperson of a Panel and set the terms of reference for a Panel review (30)	Provide administrative support for mediators and review Panels (59(1)(a))

STAGE	RESPONSIBLE AUTHORITY	MINISTER OF THE ENVIRONMENT	CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY
POST MEDIATION AND REVIEW (s.34)	Upon referral of a project back to the responsible authority by the Minister of the Environment or after the submission of a mediator's or Panel report, take one of the following courses of action: (34) 1. take any action necessary to allow the project to proceed, ensuring the implementation of any necessary mitigation measures, if the project is unlikely to cause significant adverse effects or such effects can be mitigated or justified 2. fail to take any action that would allow the project to proceed in whole or in part if the project is likely to result in significant adverse effects that cannot be mitigated or justified May issue a certificate indicating that the CEAA process has been completed (36)		

STAGE	RESPONSIBLE AUTHORITY	MINISTER OF THE ENVIRONMENT	CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY
FOLLOW UP PROGRAM (s.35)	If under s. 34(1)(a) a responsible authority allows a project to proceed, it must: (35) 1. design an appropriate follow up program and arrange for implementation 2. provide public notice of course of action chosen, mitigation measures, incorporation of recommendations from mediator's or Panel report and the follow up program to be implemented		

STAGE	RESPONSIBLE AUTHORITY	MINISTER OF THE ENVIRONMENT	CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY
GENERAL AND ONGOING		May establish research and advisory bodies (54(1)(b))	Provide, upon request of the Minister of the Environment, administrative support for any research or advisory body that the Minister may establish (59(1)(b))
		May issue guidelines and codes of practice to assist in the assessment of environmental effects (54(1)(a))	Shall provide information or training to facilitate the conduct of environmental assessments (59(1)(c))
			May issue guidelines regarding the records to be kept by responsible authorities (59(2)(e))
		May enter into agreements or arrangements with respect to assessments of environmental effects (54(1)(c)(d))	May negotiate agreements or arrangements on behalf of the Minister of the Environment (59(2)(c))
			May: (59(2)(a)(b)(d))
			1. undertake studies or activities or conduct research relating to environmental assessment
			2. advise persons and organizations on matters relating to environmental assessment
			3. examine and from time to time report to the Minister of the Environment on the implementation of the CEAA Process by responsible authorities